

July 1994

State v. Cowan: The Consequences of Montana's Abolition of the Insanity Defense

Stephanie C. Stimpson

Follow this and additional works at: <https://scholarworks.umt.edu/mlr>



Part of the [Law Commons](#)

Let us know how access to this document benefits you.

Recommended Citation

Stephanie C. Stimpson, *State v. Cowan: The Consequences of Montana's Abolition of the Insanity Defense*, 55 Mont. L. Rev. (1994).

Available at: <https://scholarworks.umt.edu/mlr/vol55/iss2/12>

This Note is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

NOTES

STATE V. COWAN: THE CONSEQUENCES OF MONTANA'S ABOLITION OF THE INSANITY DEFENSE

Stephanie C. Stimpson

Since virtue is concerned with passions and actions, and on voluntary passions and actions praise and blame are bestowed, on those that are involuntary pardon, and sometimes also pity, to distinguish the voluntary and the involuntary is presumably necessary for those who are studying the nature of virtue, and useful also for legislators with a view to the assigning both of honours and of punishments.

Aristotle¹

I. INTRODUCTION

In February 1994, Joe Junior Cowan petitioned the United States Supreme Court for a writ of certiorari to challenge the constitutionality of Montana's statutory scheme governing mental disease and defect.² The Supreme Court denied certiorari, leaving Montana's statutory scheme intact. Fifteen years ago, the Montana Legislature passed an act that effectively abolished the insanity defense.³ Montana remains one of only three states which adopted so drastic a measure to reform criminal responsibility law.⁴ Advocates

1. ARISTOTLE, *ETHICA NICOMACHEA* 1109b (W. Ross trans., 1925).

2. *State v. Cowan*, 260 Mont. 510, 861 P.2d 884 (1993), *cert. denied*, 62 U.S.L.W. 3640 (U.S. Mar. 28, 1994) (No. 93-1264).

3. 1979 Mont. Laws 1979.

4. See MONT. CODE ANN. §§ 46-14-102, -103, -311 (1993); see also IDAHO CODE § 18-207 (Supp. 1987); UTAH CODE ANN. § 76-2-305 (1990 & Supp. 1993). Three other states enacted statutes barring all evidence of mental condition, but the state supreme courts found the statutes unconstitutional. See *Sinclair v. Mississippi*, 132 So. 581, 584-87 (Miss. 1931) (McGowen, J., concurring) (finding violations of federal Due Process, Equal Protection, and Cruel and Unusual Punishment Clauses); *Louisiana v. Lange*, 123 So. 639 (La. 1929) (find-

of Montana's statutory scheme argue that the abolition of the insanity defense protects society from dangerous criminals and restricts fraudulent uses of the insanity defense.⁵ Opponents criticize the abolition of the insanity defense on constitutional and moral grounds as a violation of traditional notions of fairness, which results in cruel and unusual punishment and deprivation of due process.⁶ These countervailing policy interests present legislators with the difficult task of balancing the protection of society with mercy for the mentally ill. *State v. Cowan* exemplifies the conflicting interests and the consequences of the Montana Legislature's attempt to address the dilemma presented in cases involving a mentally ill defendant.

Since ancient times, legal systems throughout the world have recognized the insanity defense.⁷ The rationale behind the insanity defense is that a fair and moral system does not punish the mentally ill who inherently lack criminal intent.⁸ The basis of this exemption from culpability generally relies on cognitive or volitional theories.⁹ The cognitive theory of the insanity defense exempts defendants unable to understand the nature or criminality of their conduct.¹⁰ Volitional theories afford additional protection for defendants who act involuntarily and are unable to conform their conduct to the law.¹¹

The insanity defense came under a great deal of public criticism after the murder trials of Jack Ruby, Charles Manson, and Sirhan Sirhan, who each pleaded not guilty by reason of insanity.¹² Public discomfort reached the point of outrage when a federal court acquitted John Hinckley based on the insanity defense.¹³

ing violation of Due Process); *Washington v. Strasburg*, 110 P. 1020, 1023-24 (Wash. 1910) (finding a violation of the state Due Process Clause).

5. See, e.g., Abraham L. Halpern, *The Insanity Verdict, the Psychopath, and Post-Acquittal Confinement*, 24 PAC. L.J. 1125 (1993); Lynn E. Thomas, *Breaking the Stone Tablet: Criminal Law Without the Insanity Defense*, 19 IDAHO L. REV. 239 (1983).

6. See, e.g., Jonas Robitscher & Andrew K. Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9 (1982).

7. For example, the Greeks allowed an excuse when Orestes killed his mother to avenge his father. RALPH SLOVENKO, *PSYCHIATRY AND LAW* 77 (1973); see also ARISTOTLE, *supra* note 1.

8. Robitscher & Haynes, *supra* note 6, at 9-10.

9. See *infra* part II.

10. See *infra* part II.A.

11. See *infra* part II.B.

12. SLOVENKO, *supra* note 7.

13. See *United States v. Hinckley*, 525 F. Supp. 1342, 1346 (D.C. Cir. 1981). John Hinckley became obsessed with actress Jodie Foster and tried to impress her by attempting to assassinate President Reagan. *Id.*; see also Halpern, *supra* note 5, at 1144; Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55

United States v. Hinckley and other similar acquittals led members of congress to propose and adopt several reforms to laws addressing criminal responsibility for the mentally ill.¹⁴ Today, legislators and courts continue the struggle to achieve a statutory structure for criminal responsibility that both protects the interests of the mentally ill and promotes public safety.¹⁵

This Note discusses the constitutionality of Montana's mental defect statutes and judicial application as demonstrated by *State v. Cowan*. Part II sets forth the historical background of the insanity defense and the modern tests of criminal responsibility. Part III describes Montana's statutory scheme and the cases that have challenged Montana's abolition of the insanity defense. Part IV discusses *State v. Cowan* and its dissent. Part V analyzes Montana's abolition of the insanity defense and the constitutionality of Montana's mental defect statutes. Part VI concludes that Montana's mental defect statutes violate the mentally ill defendant's constitutional rights and that the concepts of due process and ordered liberty require some form of the insanity defense.

II. HISTORICAL BACKGROUND OF THE INSANITY DEFENSE

Ideas of criminal responsibility and distinctions between intentional and unintentional acts date back to Hebrew law and were further developed by Plato and Aristotle.¹⁶ A test for criminal responsibility based on knowledge of good and evil existed in English law as early as the fourteenth century.¹⁷ The early tests focused on the need for mens rea,¹⁸ or wrongful intent, to justify the imposition of criminal responsibility.¹⁹ The famous *M'Naghten*²⁰ case

U. CIN. L. REV. 943, 946 (1987); David B. Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528, 537 (1985).

14. See, e.g., Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (1988). Other reforms included changing the test for insanity, imposing a higher burden of proof on defendants using the defense, and instituting the "diminished capacity" rule in which insanity serves as a mitigating factor. Comment, *The Insanity Defense: Should Louisiana Change the Rules?*, 44 LA. L. REV. 165, 169-78 (1983); see also Mickenberg, *supra* note 13 (discussing the "guilty but mentally ill" verdict).

15. Most debates on the insanity defense focus on the burden of proof and the appropriate treatment and release of mentally ill defendants. DEBORAH ZUCKERMAN ET AL., *MENTAL DISABILITY LAW: A PRIMER* 35 (4th ed. 1992).

16. Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CAL. L. REV. 1227, 1228-29 (1966).

17. *Id.* at 1233.

18. "[G]uilty mind; a guilty or wrongful purpose." BLACK'S LAW DICTIONARY 680 (6th ed. 1991).

19. Recent Development, 104 HARV. L. REV. 1132, 1135 (1991).

20. Daniel M'Naghten's Case, 8 Eng. Rep. 718 (1843). Scholars have not determined

provided the guidelines for the insanity defense that still prevail in many American jurisdictions.²¹

A. *M'Naghten Rules*

In 1843, a British court acquitted Daniel M'Naghten who had attempted to assassinate the British Prime Minister, but who mistakenly murdered the Prime Minister's secretary.²² For the first time, a court permitted a defendant to rely on scientific evidence from the field of psychiatry to establish a defense of nonresponsibility due to mental illness.²³ The acquittal, however, enraged much of the British public and resulted in legal and political debates as to the validity of the insanity defense.²⁴ As a result, Queen Victoria demanded that the House of Lords summon the common-law judges to explain and justify the acquittal.²⁵ Accordingly, the judges announced the *M'Naghten* Rules and established what is commonly known as the right/wrong test of criminal responsibility.²⁶ The rules stated that a defendant trying to use an insanity defense must prove that, at the time of the crime, either he did not know the "nature and quality" of his act or he did not know that the act was wrong.²⁷

the correct spelling of Daniel M'Naghten's name. Its spelling varies between sources from M'Naghton to McNaughten. The most common spelling, though probably incorrect, is M'Naghten. See Bernard L. Diamond, *On the Spelling of Daniel M'Naghten's Name*, 25 OHIO ST. L.J. 84 (1964).

21. While *M'Naghten* clarified the right-wrong test, the theories behind it were already well-established in the common law. See, e.g., *Rex v. Arnold*, 16 How. St. Tr. 695 (1724) (adopting a test for criminal responsibility based on the cognitive and volitional capacities of the defendant). Today, approximately half the states either use the right-wrong test from *M'Naghten* or a close version of it. ZUCKERMAN ET AL., *supra* note 15, at 33-34.

22. *M'Naghten*, 8 Eng. Rep. at 720; see Mickenberg, *supra* note 13, at 944.

23. The defense relied on the theory of psychiatry that a defect in the defendant's personality, such as M'Naghten's delusions of persecution, could cause him to commit a crime, even though he could otherwise distinguish between right and wrong. Mickenberg, *supra* note 13, at 945.

24. Mickenberg, *supra* note 13, at 945 (suggesting that this same debate has endured for 140 years as evidenced by a comparison of the reactions to the acquittals of M'Naghten in 1843 and John Hinckley in 1982).

25. Jeanne M. Bender, *After Abolition: The Present State of the Insanity Defense in Montana*, 45 MONT. L. REV. 133, 134 (1984).

26. *Id.* at 134-35.

27. *M'Naghten*, 8 Eng. Rep. at 722. The court concluded that:

[t]he jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence [sic] on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was

Although *M'Naghten* formed the basis for the insanity defense in American law, courts have interpreted the two parts of the cognitive test in various ways.²⁸ The test analyzes defendants' cognitive states and moral judgments, not their emotional or volitional states.²⁹ Essentially, the *M'Naghten* test determines whether a defendant knew the conduct was wrong when the defendant committed the crime.³⁰ Some courts have criticized the *M'Naghten* test because it failed to address defendants who acted involuntarily and could not conform their conduct to the law.³¹

B. Irresistible Impulse Test

As a result of the criticism of the *M'Naghten* test, courts developed the irresistible impulse test, which requires both cognition and freedom of will for criminal responsibility.³² An Alabama court explained the irresistible impulse test in *Parsons v. Alabama*.³³ That decision stated that a court should acquit a defendant if he met the *M'Naghten* criteria or if "he had . . . lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed."³⁴ The court intended to protect defendants who possessed the cognition described in the *M'Naghten* test, but lacked volitional capacity

wrong.

Id.

28. Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L. REV. 1371, 1381 (1986). Some courts have narrowly interpreted the first part of the test—knowledge of the nature of the act—to mean awareness of the physical nature and consequences of the act. Other courts have construed the required knowledge more broadly to include awareness of the person's relation to others, ability to reason, and capacity to appreciate the significance of the act. *Id.* Compare *Arizona v. Brosie*, 553 P.2d 1203, 1205 (Ariz. 1976) (adopting a narrow interpretation) with *Connecticut v. Conte*, 251 A.2d 81, 82 (Conn. 1968) (interpreting the first part of the test broadly to include capacity to reason and understand the act). Courts have interpreted the second part of the test, understanding of the wrongfulness of the act, to refer to the legal criminality of the conduct. Other courts have included knowledge of legal and moral wrongness in the second prong of the test. Sendor, *supra*, at 1382. Compare *Iowa v. Haman*, 285 N.W.2d 180, 183 (Iowa 1979) (using a narrow interpretation) with *South Carolina v. Law*, 244 S.E.2d 302, 304 (S.C. 1978) (including both legal and moral wrongness in a broad interpretation).

29. *M'Naghten's* right-wrong test remains the most prominent formulation of the insanity test. ZUCKERMAN ET AL., *supra* note 15, at 33. The American Bar Association (ABA) supports the use of an exclusively cognitive test for the insanity defense. Wexler, *supra* note 13, at 532.

30. SLOVENKO, *supra* note 7, at 79.

31. See, e.g., *Parsons v. Alabama*, 2 So. 854, 865-66 (Ala. 1887).

32. Sendor, *supra* note 28, at 1383.

33. 2 So. 854 (Ala. 1887).

34. *Parsons v. Alabama*, 2 So. at 866.

and the ability to control or resist their actions.³⁵

C. The Product Test

In *Durham v. United States*,³⁶ the court applied the product test that exculpated a defendant whose "unlawful act was the product of mental disease or mental defect."³⁷ The product test permitted evidence of all aspects of the defendant's mental illness that could influence or cause the criminal conduct, instead of restricting the evidence to specific cognitive or volitional incapacities.³⁸ The District of Columbia Court of Appeals, however, overruled *Durham* and its product test in 1972 because the test failed to provide adequate guidance to courts and jurors about the exculpatory nature of mental illness.³⁹

D. Model Penal Code Test

During the 1950's, the American Law Institute formulated the Model Penal Code Test for insanity that exculpated a defendant if "at the time of such conduct as a result of mental disease or defect he lack[ed] substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."⁴⁰ Thus, the Model Penal Code test encompassed aspects of both *M'Naghten's* test and the irresistible impulse test.⁴¹ Almost half the states used this test for insanity, but several states abandoned it following Hinckley's acquittal and the resulting concern about the early release of dangerous defendants.⁴²

35. *Id.* at 859.

36. 214 F.2d 862 (D.C. Cir. 1954), overruled by *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

37. *Durham*, 214 F.2d at 874-75. An earlier version of the product test appeared in New Hampshire in 1869. *New Hampshire v. Pike*, 49 N.H. 399 (1869).

38. Sendor, *supra* note 28, at 1385-86.

39. See *Brawner*, 471 F.2d at 991; see also Sendor, *supra* note 28, at 1386 n.73.

40. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

41. Sendor, *supra* note 28, at 1387. Sendor describes three significant aspects to the drafter's choice of words:

(1) The drafters used the word "appreciate" instead of "know" to include emotional awareness as well as intellectual awareness.

(2) The use of the words "conform his conduct" instead of "irresistible impulse" permits the defense to apply to planned acts as well as sudden acts.

(3) The provision excusing the defendant who lacks "substantial" cognitive or volitional capacity exculpates defendants who are greatly impaired as well as totally impaired.

Sendor, *supra* note 28, at 1387-88 (citing MODEL PENAL CODE § 4.01 cmts. 2-4, at 157-59 (Tent. Draft No. 3, 1955)).

42. ZUCKERMAN ET AL., *supra* note 15, at 34.

E. *Insanity Defense Reform Act Test*

In 1984, Congress enacted the Insanity Defense Reform Act.⁴³ The federal insanity defense test combines the *M'Naghten* test and the cognitive prong of the Model Penal Code test. Under the federal insanity defense test, a court may acquit a defendant who, "as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts."⁴⁴ The federal test eliminates the volitional prong of the Model Penal Code Test and requires that the defendant suffer a severe mental disease or defect.⁴⁵ The Insanity Defense Reform Act requires defendants to prove by clear and convincing evidence their insanity.⁴⁶

F. *Other Formulations of the Insanity Defense*

Several states have adopted an alternative to the insanity defense that results in a verdict of "guilty but mentally ill."⁴⁷ In cases involving a guilty but mentally ill verdict, the mental illness obstructs the defendant's capacity at the time of the crime, but not to the extent that the defendant was legally insane.⁴⁸ Other states have adopted the use of the Diminished Capacity Rule, which allows a defendant's mental illness to serve as a mitigating factor or as evidence that the defendant lacked the requisite mental state to commit a crime.⁴⁹

III. CRIMINAL RESPONSIBILITY LAW IN MONTANA

Before 1979, Montana's treatment of criminal responsibility law followed the national trend and embodied similar aspects of different tests and theories of insanity. In 1899, the Montana Supreme Court adopted a test for the insanity defense that combined the *M'Naghten* and irresistible impulse tests.⁵⁰ The legislature prescribed the Model Penal Code test in 1967 but changed the wording from "lacks substantial capacity" to "is unable," thus imposing

43. Pub. L. No. 98-473, 98 Stat. 2057 (1984) (codified at 18 U.S.C. § 17(a) (1988)).

44. Insanity Defense Reform Act of 1984, 18 U.S.C. § 17(a) (1988).

45. 18 U.S.C. § 17(a).

46. 18 U.S.C. § 17(a). Federal courts and approximately two-thirds of the state jurisdictions follow this allocation of the burden of proof. ZUCKERMAN ET AL., *supra* note 15, at 35.

47. ZUCKERMAN ET AL., *supra* note 15, at 37.

48. ZUCKERMAN ET AL., *supra* note 15, at 37.

49. ZUCKERMAN ET AL., *supra* note 15, at 37-38.

50. See *State v. Peel*, 23 Mont. 358, 59 P. 169 (1899).

a higher burden on the defendant.⁵¹ In 1979, the legislature abolished the affirmative defense of mental disease or defect.⁵² The legislature's action resulted from increasing frustration with perceived fraudulent assertions of the insanity defense and the growing role of psychiatrists in criminal trials.⁵³ The legislators shifted the Model Penal Code test for insanity to the sentencing statutes and placed consideration of a defendant's mental defect in the post-conviction phase of the criminal proceedings.⁵⁴

A. *Montana's Statutory Scheme Governing Mental Disease and Defect*

Montana's present statutory structure governing mental defect allows a court to evaluate a defendant's mental illness at three stages of a trial. Initially, mental health professionals evaluate a defendant for competency to stand trial.⁵⁵ The defendant's competency depends on the ability to "understand the proceedings" and "assist in . . . his own defense."⁵⁶ If adjudged competent, the defendant may only use evidence of insanity during trial to contest the mental state element of a crime.⁵⁷ In most criminal cases, the state must prove a mental state of "purposely," "knowingly," or "negligently" in order to impose criminal responsibility.⁵⁸ Once convicted, the defendant may introduce evidence of mental illness during the sentencing hearing so the court can send the defendant to a facility appropriate to meet the defendant's needs.⁵⁹

51. MONT. REV. CODE § 95-501 (1947); see Bender, *supra* note 25, at 136.

52. 1979 Mont. Laws 1979.

53. Bender, *supra* note 25, at 137 & n.30.

54. Bender, *supra* note 25, at 136-37.

55. MONT. CODE ANN. § 46-14-103 (1993).

56. Section 46-14-103 of the Montana Code provides in full that "[a] person who, as a result of mental disease or defect, is unable to understand the proceedings against the person or to assist in the person's own defense may not be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." MONT. CODE ANN. § 46-14-103 (1993).

57. Section 46-14-102 of the Montana Code states that "[e]vidence that the defendant suffered from a mental disease or defect is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense." MONT. CODE ANN. § 46-14-102 (1993).

58. See MONT. CODE ANN. § 45-2-101(33), (37), (58) (1993).

59. Section 46-14-311 of the Montana Code provides:

Whenever a defendant is convicted on a verdict or a plea of guilty and claims that at the time of the commission of the offense of which convicted the defendant was suffering from a mental disease or defect that rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of law, the sentencing court shall consider any relevant evidence presented at the trial and shall require additional evidence as it considers necessary for the determination of the issue, including examination of

B. Cases Challenging Montana's Statutory Scheme

In addition to *Cowan*, two cases have challenged the constitutionality of Montana's abolition of the insanity defense.⁶⁰ In both cases, the defendants unsuccessfully asserted that the Fourteenth Amendment Due Process Clause and the Eighth Amendment Cruel and Unusual Punishment Clause require some form of the insanity defense.⁶¹

1. *State v. Korell*

In *State v. Korell*,⁶² the defendant was charged with attempted deliberated homicide and aggravated assault. Korell's defense claimed that he lacked the requisite mental state by reason of insanity.⁶³ Korell, a Vietnam veteran who suffered from a paranoid disorder, worked at a Missoula hospital as an extern under the supervision of Greg Lockwood. Korell's relationship with Lockwood deteriorated until the hospital finally transferred Korell.⁶⁴ In June 1982, Korell returned to Missoula because he felt that he had to kill Lockwood before Lockwood killed him. He entered Lockwood's house and began firing his gun at Lockwood and his wife. Lockwood, after suffering gun and knife wounds, eventually subdued Korell.⁶⁵

Before trial, Korell sought a writ of supervisory control declaring that he had a right to rely on the defense that he suffered from a mental disease or defect at the time he committed the crimes. The Montana Supreme Court denied the writ. During trial, the district court instructed that the jury could take into account the defendant's mental disease or defect only insofar as it negated the defendant's requisite state of mind. The jury found Korell guilty on both counts.⁶⁶

Korell raised several issues on appeal, the most important being whether a defendant has a constitutional right to raise insanity as an independent defense.⁶⁷ The *Korell* case presented the first

the defendant and a report of the examination

MONT. CODE ANN. § 46-14-311 (1993).

60. *State v. Korell*, 213 Mont. 316, 690 P.2d 992 (1984); *State v. Byers*, ____ Mont. ____, 861 P.2d 860 (1993).

61. *Korell*, 213 Mont. at 330, 690 P.2d at 1000; *Byers*, ____ Mont. at ____, 861 P.2d at 867.

62. 213 Mont. 316, 690 P.2d 992 (1984).

63. *Korell*, 213 Mont. at 319, 690 P.2d at 994.

64. *Id.* at 320, 690 P.2d at 995.

65. *Id.* at 320-21, 690 P.2d at 995.

66. *Id.* at 321-22, 690 P.2d at 996.

67. *Id.* at 322, 690 P.2d at 996.

direct constitutional challenge to Montana's abolition of the insanity defense. Korell argued that Montana's abolition of the insanity defense violated his Fourteenth Amendment right to due process and his Eighth Amendment protection against cruel and unusual punishment.⁶⁸ The court in *Korell* discussed the history of the insanity defense and the traditional doctrine of mens rea, which states that without criminal intent, no blameworthiness or crime exists.

The court ultimately held that Montana's consideration of mental disease or defect at the three different stages of criminal proceedings adequately protects a defendant with a mental illness.⁶⁹ The court concluded that the insanity defense is not a fundamental right and that Montana's statutory scheme does not unconstitutionally shift the burden of proof on the mental state element of the crime.⁷⁰

2. *State v. Byers*

Montana's statutory scheme governing mental disease or defect was not challenged again until 1993 in *State v. Byers*.⁷¹ In *Byers*, the defendant fatally shot two Montana State University students in a dormitory room on campus. Byers was arrested and charged with two counts of deliberate homicide. At the arraignment, Byers gave notice that he would introduce evidence of mental disease or defect during trial.⁷²

Byers underwent psychiatric evaluations conducted by Warm Springs State Hospital, a psychiatrist for the State, and a forensic psychiatrist whom Byers obtained. During trial, Byers introduced evidence that he suffered from borderline personality disorder. Byers alleged that, at the time of the murders, he suffered from a derealized state and, therefore, he did not act knowingly, purposely, or voluntarily. The State contended that Byers did act with

68. *Id.* at 327, 332, 690 P.2d at 998, 1001.

69. *Id.* at 322-23, 690 P.2d at 996-97. The court further stated that "the attendant stigma of a criminal conviction is mitigated by the sentencing judge's personal consideration of the defendant's mental condition and provision for commitment to an appropriate institution for treatment, as an alternative to a sentence of imprisonment." *Id.* at 334, 690 P.2d at 1002.

70. *Id.* at 330, 690 P.2d at 1000 (relying on *Leland v. Oregon*, 343 U.S. 790 (1952), which upheld the Oregon statute requiring the defendant to prove insanity beyond a reasonable doubt).

71. ____ Mont. ____, 861 P.2d 860 (1993). The Montana Supreme Court decided the appeals of Byers and Cowan at the same time and applied basically the same analysis to both cases regarding the constitutionality of Montana's statutory structure governing mental disease and defect.

72. *Byers*, ____ Mont. at ____, 861 P.2d at 864.

the requisite mental state of “knowingly.”⁷³

The jury found Byers guilty of both counts of deliberate homicide. He was sentenced to two seventy-five-year terms for the deliberate homicides and fifteen years for the use of a weapon with all terms to run consecutively.⁷⁴ Byers appealed his conviction and argued that Montana’s mental disease or defect statute unconstitutionally shifted the burden of proof on the issue of mental state from the prosecution to the defense.⁷⁵ The court summarily concluded that the burden did not shift and that whether the Byer’s mental defect prevented him from having the requisite mental state was a question for the jury.⁷⁶

Byers also claimed that the Montana law governing the mental disease or defect violated his right to due process.⁷⁷ The court held that Montana’s statutory scheme evaluating the defendant’s mental disease or defect at the three different stages of criminal proceedings provides adequate due process.⁷⁸ The court relied on its prior decision in *Korell* and said that no constitutional right to plead insanity exists.⁷⁹ Accordingly, the court in *Byers* found Montana’s statutory structure constitutionally sound.⁸⁰

IV. STATE v. COWAN

A. Statement of Facts

On April 24, 1990, Margaret Doherty (Doherty), a United States Forest Service employee, returned to her living quarters in a forest service cabin and discovered that someone had been in the cabin eating food and watching television.⁸¹ Doherty locked the doors and called the police. While on the phone with the police, Doherty saw Cowan circling the cabin trying to gain entrance. He called Doherty a “society bitch” and a “mechanic robot bitch,” and he yelled “it’s my house” and other unintelligible statements.⁸² Cowan also kicked at Doherty’s car and pulled at her license plates.⁸³

Cowan found a tree-planting tool called a hodag and used it to

73. *Id.* at ____, 861 P.2d at 864.

74. *Id.* at ____, 861 P.2d at 864.

75. *Id.* at ____, 861 P.2d at 864.

76. *Id.* at ____, 861 P.2d at 864.

77. *Id.* at ____, 861 P.2d at 866.

78. *Id.* at ____, 861 P.2d at 866-67.

79. *Id.* at ____, 861 P.2d at 866.

80. *Byers*, __ Mont. at ____, 861 P.2d at 864-67.

81. *State v. Cowan*, 260 Mont. 510, 512, 861 P.2d 884, 885 (1993).

82. Petitioner’s Brief at 4, *Cowan* (No. 93-1264).

83. *Cowan*, 260 Mont. at 520, 861 P.2d at 890 (Trieweller, J., dissenting).

gain entry to the cabin. Cowan knew Doherty had called the police, but he ignored the call and the gun Doherty pointed at him.⁸⁴ When Doherty asked who he was, Cowan mimicked her and told her to get out of his house.⁸⁵ When Cowan approached Doherty, she tried to shoot the gun, but it misfired. Cowan then attacked Doherty with the hodag and struck her repeatedly in the head, arms, and shoulders until she fell into a semi-conscious state.⁸⁶

The officers who responded to Doherty's call found Cowan outside of the cabin. When the officers approached him at gun-point, Cowan ran away to retrieve his backpack. Cowan, however, did not try to escape, and the officers found him waiting next to the mess hall where he surrendered quietly.⁸⁷ The officers then found Doherty, severely injured, lying in the kitchen.⁸⁸

Several psychologists and psychiatrists examined Cowan prior to trial, and each of them concluded that he suffered from paranoid schizophrenia, a form of mental disease.⁸⁹ For example, Dr. Hoell, a psychiatrist for the defense who studied Cowan and his medical history, testified that Cowan had been hospitalized in the past for depression, psychotic disorder, and schizophrenia. He diagnosed Cowan as suffering from schizophrenia, which includes symptoms of hallucinations, delusions, and paranoia. During their conversations, Cowan described delusional thoughts about people being programmed by religious groups and the government. Dr. Hoell opined that Cowan suffered from a psychotic state at the time of the attack on Doherty and that Cowan could not understand the reality or the criminality of his conduct.⁹⁰

B. Procedure

Cowan was charged with attempted deliberate homicide and aggravated burglary.⁹¹ Following psychiatric evaluations of Cowan's mental state, the court found Cowan competent to stand trial.⁹² Cowan waived his right to a jury trial and filed a notice of intent to inform the court that he would rely on mental disease to disprove the necessary criminal state of mind.⁹³ The sole issue in

84. Petitioner's Brief, *supra* note 82, at 4.

85. *Cowan*, 260 Mont. at 520, 861 P.2d at 890 (Triewiler, J., dissenting).

86. Petitioner's Brief, *supra* note 82, at 5.

87. *Id.*; *Cowan*, 260 Mont. at 520, 861 P.2d at 891 (Triewiler, J., dissenting).

88. *Cowan*, 260 Mont. at 512, 861 P.2d at 885.

89. *Id.* at 521, 861 P.2d at 891 (Triewiler, J., dissenting).

90. *Id.*

91. Petitioner's Brief, *supra* note 82, at 10.

92. *Cowan*, 260 Mont. at 512, 861 P.2d at 885.

93. Petitioner's Brief, *supra* note 82, at 10-11. Montana law requires the defendant to

Cowan was whether Cowan should be acquitted by reason of insanity.⁹⁴ Defense counsel filed a memorandum that challenged Montana's statutory scheme and argued that the Due Process Clause and the Eighth Amendment protection against cruel and unusual punishment guarantee the right to an acquittal based on the insanity defense. On December 20, 1990, the court found Cowan guilty as charged.⁹⁵ During the sentencing hearing in February 1991, the court considered whether Cowan should be confined in prison or in a mental hospital. The court sentenced Cowan to serve sixty years in the Montana State Prison.⁹⁶

Cowan appealed to the Montana Supreme Court raising three issues: (1) whether the State proved the necessary mental state of the crimes charged beyond a reasonable doubt; (2) whether Montana's statutory scheme governing mental disease or defect establishes a conclusive presumption of criminal intent; and (3) whether sending Cowan to prison violates the Eighth and Fourteenth Amendments of the United States Constitution. The Montana Supreme Court affirmed the trial court's decision.⁹⁷

C. Analysis

In *Cowan*, the supreme court first analyzed the issue of mental state.⁹⁸ To convict Cowan of attempted deliberate homicide, the State had to prove that Cowan "knowingly" or "purposely" attempted to cause the death of another human being.⁹⁹ The aggravated burglary charge required that he "knowingly" entered an occupied structure with the purpose to commit an offense while armed with a weapon.¹⁰⁰ While Cowan admitted the conduct elements of the crimes, he denied that he had the requisite mental state of "purposely" or "knowingly."¹⁰¹

Cowan argued that the expert testimony regarding his mental

file a pretrial notice of his intent to rely on mental disease to prove that he lacked the necessary mental state. MONT. CODE ANN. § 46-15-323(3) (1993).

94. Petitioner's Brief, *supra* note 82, at 11. Petitioner alleged that because Montana abolished insanity as an independent defense, the only grounds for an insanity acquittal occur when a defendant shows that he could not act deliberately to meet the requisite mental state of knowingly or purposely. Petitioner's Brief, *supra* note 82, at 11.

95. Petitioner's Brief, *supra* note 82, at 11; *see also Cowan*, 260 Mont. at 512, 861 P.2d at 885.

96. Petitioner's Brief, *supra* note 82, at 12.

97. *Cowan*, 260 Mont. at 511, 861 P.2d at 885.

98. *Id.* at 512, 861 P.2d at 886.

99. *Id.* at 512-13, 861 P.2d at 886 (citing MONT. CODE ANN. §§ 45-4-103, 45-5-102 (1993)).

100. *Id.* at 513, 861 P.2d at 886 (citing MONT. CODE ANN. § 46-6-204(2)(a) (1993)).

101. *Id.*

illness clearly raised a reasonable doubt about whether he deliberately committed the crimes.¹⁰² Cowan argued that the evidence showed that he suffered from schizophrenia and that he suffered a psychotic episode at the time of the attack. The State, however, contested Cowan's credibility and argued that he exaggerated his symptoms.¹⁰³ The State further contended that Cowan's schizophrenic states occurred sporadically and that no means existed to determine whether Cowan suffered from a psychotic episode at the time of the attack.¹⁰⁴

The supreme court acknowledged that the trier of fact determines the weight of evidence and credibility of witnesses. Based on that general rule, the court found that the trier of fact could have weighed the evidence and deduced that Cowan had not suffered a psychotic state at the time of the attack. The court further reasoned that the existence of a mental disease or defect does not prevent a person from acting knowingly or purposely.¹⁰⁵ The court found sufficient evidence to support the district court's finding that Cowan was lucid at the time of the attack, that he knew Doherty was a human, not a robot, and that he possessed the requisite mental state to be convicted of attempted deliberate homicide and aggravated burglary.¹⁰⁶

Cowan next asserted that the statutory scheme governing the presentation of evidence of mental disease or defect established a conclusive presumption of criminal intent and, thus, violated the United States Supreme Court's decision in *Sandstrom v. Montana*.¹⁰⁷ In *Sandstrom*, the trial court gave a jury instruction which stated that a defendant "intends the ordinary consequences of his voluntary acts."¹⁰⁸ The Supreme Court held that the instruction created an impermissible presumption in violation of the Fourteenth Amendment Due Process Clause.¹⁰⁹ The Supreme Court reasoned that the presumption relieved the prosecution of the burden of proving mental state, an element of the crime, because it required an inference of criminal intent from the criminal

102. *Id.* at 513, 861 P.2d at 886.

103. *Id.* at 514, 861 P.2d at 886. Cowan did not describe the delusion that Doherty was a robot until his third interview with the State psychologist. Another psychologist also testified that Cowan frequently lies to get out of trouble. *Id.* at 514, 861 P.2d at 886-87.

104. *Id.* at 514, 861 P.2d at 886.

105. *Id.* at 514, 861 P.2d at 887 (citing the decision in *State v. Byers*, Mont., 861 P.2d 860 (1993)).

106. *Id.* at 515, 861 P.2d at 887.

107. *Id.* at 516, 861 P.2d at 887-88 (citing *Sandstrom v. Montana*, 442 U.S. 510 (1979)).

108. *Sandstrom*, 442 U.S. at 513.

109. *Id.* at 524.

conduct.¹¹⁰

Although the court gave no jury instructions because Cowan had a bench trial, Cowan contended that the district judge relied on statutes which created a conclusive presumption of mental state.¹¹¹ Cowan argued that, although section 46-14-102 of the Montana Code allows evidence of mental disease or defect to prove or disprove the requisite mental state of the crime charged, the mental defect does not constitute a valid defense in itself. Cowan alleged that any evidence of organized conduct allows an inference of criminal intent. Consequently, Cowan argued, a court will never acquit someone who commits a criminal act because each crime involves at least a minimal level of organized conduct.¹¹²

The Montana Supreme Court upheld the constitutionality of the abolition of the insanity defense, finding that Cowan's due process right had not been violated. The court cited its previous decisions in *Byers* and *Korell* and reasoned that the Due Process Clause of the United States Constitution does not require the use of any particular insanity test or allocation of burden of proof.¹¹³

The court noted that the language of section 45-5-112 of the Montana Code states that conduct "may" suffice to establish criminal intent and that the fact finder determines whether the defendant possessed the requisite intent.¹¹⁴ The court concluded that the statute creates a permissive inference rather than a conclusive presumption and does not violate the *Sandstrom* doctrine.¹¹⁵

Finally, Cowan asserted that his sentence to the Montana State Prison violated his Eighth and Fourteenth Amendment rights. Cowan argued that the punishment constituted inhumane

110. *Id.* at 523.

111. *Cowan*, 260 Mont. at 516, 861 P.2d at 888.

112. *Id.*

113. *Id.* (citing *Leland v. Oregon*, 343 U.S. 790 (1952)). In *Leland*, the Court upheld an Oregon statute that placed the burden of proving insanity beyond a reasonable doubt on the defendant. The United States Supreme Court reasoned that the State retained the burden to prove the requisite mental state. The Court refused the defendant's argument that he had a right to the irresistible impulse test form of an insanity defense. Instead, the United States Supreme Court held that the individual states can determine the test for criminal insanity and which party has the burden of proof on the issue of insanity. *Leland*, 343 U.S. at 798-99.

During the last 30 years, courts have interpreted *Leland* very differently. Some courts have concluded, based on *Leland*, that a state can deny the insanity defense altogether. See, e.g., *State v. Byers*, ___ Mont. ___, ___, 861 P.2d 860, 866 (1993). Other courts have reached the opposite conclusion, holding that *Leland* requires some form of the insanity defense. See, e.g., *California v. Skinner*, 704 P.2d 752, 758 (Cal. 1985).

114. *Cowan*, 260 Mont. at 516, 861 P.2d at 888; see MONT. CODE ANN. § 45-5-112 (1993).

115. *Cowan*, 260 Mont. at 517, 861 P.2d at 888.

treatment. He contended that considering a defendant's insanity only for the purpose of reducing the degree of the crime or determining the punishment for the crime qualifies as cruel and unusual punishment and a violation of due process.¹¹⁶ The court refused to adopt Cowan's argument that the insanity defense constitutes a fundamental right dictated by the Constitution.¹¹⁷ Instead, the court held that no specific insanity defense is required by the Due Process Clause. The court reasoned that Montana's criminal procedures, which consider the defendant's mental defect at three stages of a trial, provide adequate due process.¹¹⁸

The court reiterated a passage from *Korell*, where it reasoned that while Montana's statutory scheme governing mentally ill defendants does not further the goals of deterrence or prevention because the defendant is unable to appreciate the criminality of his conduct, the statutes promote the goals of protection of society and education.¹¹⁹ Finally, the court clarified that the district court placed Cowan in the custody of the Department of Institutions, not prison, and that the Department of Institutions could determine whether Cowan needed treatment at a facility other than the state prison.¹²⁰

D. The Dissent

Justice Trieweler dissented in a lengthy opinion in which Justice Hunt joined.¹²¹ Trieweler concluded that Montana's abolition of the insanity defense in 1979 violated the defendant's constitutional right of due process.¹²² Trieweler stated that Montana's statutory scheme regarding mental defect contradicts fundamental principles of fairness prevalent in judicial systems for more than 700 years.¹²³ Trieweler deduced a conclusion opposite of the majority's in his interpretation of *Leland v. Oregon*.¹²⁴ According to Trieweler, *Leland* stands for the proposition that the United

116. *Id.*

117. *Id.* at 517-18, 861 P.2d at 888-89.

118. *Id.* at 518, 861 P.2d at 889. The present statutory scheme prescribes that the court consider the defendant's mental disease or defect before trial to determine competency to stand trial, during trial to disprove mental state, and during sentencing. MONT. CODE ANN. §§ 46-14-102, -103, -201(2), -221, -311, -312 (1993); see *State v. Korell*, 213 Mont. 316, 690 P.2d 992, 996-97 (1984).

119. *Cowan*, 260 Mont. at 517, 861 P.2d at 889 (quoting *Korell*, 213 Mont. at 334, 690 P.2d at 1002).

120. *Id.*

121. *Id.* at 518-27, 861 P.2d at 889-95.

122. *Id.* at 518, 861 P.2d at 889.

123. *Id.*

124. *Id.* (citing *Leland*, 343 U.S. 790).

States Constitution requires no specific form of the insanity defense. Trieweler reasoned, however, that implicit in the *Leland* decision, the United States Supreme Court held that due process requires some form of the insanity defense.¹²⁵

Trieweler asserted that Montana's abolition of the insanity defense, and the present statutory scheme inadequately protect a mentally ill defendant by simply allowing a court the option of considering mental illness when deciding punishment.¹²⁶ Trieweler stated that the statutes only theoretically allow evidence of mental defect to disprove the requisite mental state. In actuality, the only state of mind necessary is knowingly or purposely, and no element requires that the defendant cognitively understand the criminality of his conduct or that he be able to conform his conduct to abide by the law.¹²⁷ Trieweler opined that the facts of *Cowan* present the "worst case scenario" of how Montana's statutory scheme inadequately and unconstitutionally addresses mentally ill defendants.¹²⁸

Trieweler further denounced the majority's reliance on the decision in *Korell* because he felt the court in *Korell* relied heavily on a misinterpretation of *Leland*.¹²⁹ The dissent pointed out that the United States Supreme Court has not decided the issue of whether a state can constitutionally abolish the insanity defense.¹³⁰ However, three state courts have found unconstitutional their state statutes that attempted to abolish the insanity defense.¹³¹ Trieweler said that the majority distinguished those prior decisions because Montana's statutory scheme permits a limited amount of evidence of mental defect, but he found that the statutes provide inadequate protection for the mentally ill criminal defendant.¹³² Finally, Trieweler concluded that the insanity defense

125. *Id.* at 518-19, 861 P.2d at 889. Trieweler relied on *Skinner*, 704 P.2d at 752, in which the California Supreme Court cited *Leland* for the opposite proposition than did the Montana Supreme Court. *Cowan*, 260 Mont. at 518-19, 861 P.2d at 889.

126. *Cowan*, 260 Mont. at 520, 861 P.2d at 890.

127. *Id.* at 520, 861 P.2d at 890. Trieweler argued that some form of the *M'Naghten* test be in place.

128. *Cowan*, 260 Mont. at 523, 861 P.2d at 892 (describing Cowan's irrational behavior, his apparent delusions, and the several psychiatric evaluations diagnosing him with serious mental illness).

129. *Id.* at 523-24, 861 P.2d at 892-93.

130. *Id.* at 524, 861 P.2d at 893.

131. See *Sinclair v. Mississippi*, 132 So. 581 (Miss. 1931); *Louisiana v. Lange*, 123 So. 639 (La. 1929); *Washington v. Strasburg*, 110 P. 1020 (Wash. 1910).

132. *Cowan*, 260 Mont. at 524, 861 P.2d at 893. Trieweler emphasized the importance of the insanity defense throughout the history of criminal law, and he referred repeatedly to Justice McDevitt's strong dissent in *Idaho v. Searcy*, 798 P.2d 914 (Idaho 1990). *Cowan*, 260 Mont. at 524, 861 P.2d at 893.

is implicit in the doctrine of ordered liberty as evidenced by historical precedence and its nearly universal acceptance in American jurisdictions.¹³³

E. Cowan's Petition to the United States Supreme Court

In January 1994, Joe Junior Cowan petitioned the United States Supreme Court for a writ of certiorari.¹³⁴ Cowan's petition asserted that Montana's statutory scheme governing mental disease and defect violates his right to due process and results in a constitutional shifting of the burden of proof on the issue of mental state in contradiction of *Sandstrom v. Montana*.¹³⁵ The Supreme Court, however, denied Cowan's petition for certiorari.¹³⁶

V. ANALYSIS OF MONTANA'S STATUTORY STRUCTURE FOR MENTAL DISEASE AND DEFECT

Despite the United States Supreme Court's denial of Cowan's petition for certiorari, the Montana Legislature should carefully reassess the implications of the present statutory scheme governing mental disease and defect.¹³⁷ Montana's mental disease and defect statutes do not provide adequate due process, and the statutes offend traditional notions of fairness and mercy for the mentally ill. Montana's statutory scheme purports to permit evidence of mental disease or defect at three stages of a criminal proceeding.¹³⁸ In practice, however, the statutes governing mental disease or defect afford inadequate protection to the defendant, such as Cowan, who suffers from severe mental illness.

In cases of extreme mental illness, a court will presumably consider the mental defect of the accused and determine that the defendant is unfit to stand trial. If so, the defendant receives treatment in an appropriate institution and avoids a criminal conviction. However, determinations of incompetence only rarely occur because the statutory language requires that the defendant cannot understand the charge against the defendant or assist in the de-

133. *Cowan*, 260 Mont. at 526, 861 P.2d at 894 (commenting that the only jurisdictions without an insanity defense are Montana, Idaho, and Utah).

134. *State v. Cowan*, 260 Mont. 510, 861 P.2d 884 (1993), *petition for cert. filed*, 62 U.S.L.W. 3555 (U.S. Feb. 1, 1994) (No. 93-1264).

135. Petitioner's Brief, *supra* note 82, at i, *Cowan* (No. 93-1264).

136. *State v. Cowan*, 260 Mont. 510, 861 P.2d 884 (1993), *cert. denied*, 62 U.S.L.W. 3640 (U.S. Mar. 28, 1994) (No. 93-1264).

137. The Supreme Court's denial of Cowan's petition for certiorari does not preclude the possibility that Montana's statutory scheme governing criminal responsibility is unconstitutional or that certiorari will be granted in a future case.

138. See MONT. CODE ANN. §§ 46-14-102, -103, -311 (1993); see *supra* part III.

fendant's own defense, not merely that the person suffers from a mental illness.¹³⁹

If deemed competent to stand trial, the defendant can introduce evidence of the defendant's mental illness for the second time to show that the defendant lacked the requisite mental state of the crime.¹⁴⁰ The evidence, however, generally does not suffice to rebut an assertion that the defendant acted knowingly or purposely. The failure results from the broad statutory definitions of knowingly and purposely, which permit the fact finder to infer intent from the action.¹⁴¹ "Knowingly" and "purposely" neither require cognitive awareness of the criminality of the act nor volitional capacity to establish the mental state element of the crime. Evidence of mental illness will negate mental state only in the few cases of drastic mental defect where the defendant is so delusional that he does not comprehend his physical acts.¹⁴² The defendant need not

139. See MONT. CODE ANN. § 46-14-311 (1993).

140. See MONT. CODE ANN. § 46-14-102 (1993).

141. Section 45-2-101(33) of the Montana Code defines "knowingly" as follows: [A] person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence.

MONT. CODE ANN. § 45-2-101(33) (1993). Section 45-2-101(58) of the Montana Code defines "purposely" as follows:

[A] person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

MONT. CODE ANN. § 45-2-101(58) (1993).

142. For example, if someone killed another person because he thought God told him to, he intended the act of killing. Thus, in Montana that defendant could be determined to have acted knowingly. The ABA presented a hypothetical somewhat similar to Cowan's situation in its amicus curiae brief that argued against the abolition of the insanity defense as follows:

[The abolitionist approach] would give no exculpatory significance to even the most overpowering delusions in those cases where a defendant, notwithstanding psychotic illness, knew at the most superficial level what he was doing. Thus, a paranoid schizophrenic suffering severe delusions of persecution and fearing imagined attempts upon his life would be convicted of theft if he, for example, knowingly and intentionally stole a radio from a department store. It would no matter that delusions of persecution led him to believe that he had to have that particular radio in order to receive FBI bulletins regarding the whereabouts of his imagined assassins. Nor would it matter that his delusions led him to conclude that he had to steal the radio so that there would be no record of his possession of that radio. Evidence of his delusions would simply be irrelevant on the issue of his intent to take the property of another and, as a result, would be inadmissible.

have acted with "mens rea" or wrongful intent; he simply must have intended his physical action.

Montana's statutory scheme regarding mental disease or defect enables the fact finder to infer criminal intent from evidence of the physical act without an actual finding of the requisite mental state. Montana's statutory scheme, therefore, contradicts the rule enunciated in *Sandstrom v. Montana*¹⁴³ by essentially relieving the State of the burden of proving mental state.¹⁴⁴ The burden is lifted because the "evidence of organized or integrated conduct may suffice to establish criminal intent."¹⁴⁵ Fact finders, consequently, are likely to find intent based on the defendant's actions alone, despite that the defendant suffered from the delusions of a severe mental defect.

Even if the inference of intent from action did not shift the burden of proof from the state to the defense, the inference of intent from the defendant's actions can be attacked because it is not a reasonable inference.¹⁴⁶ Fact finders can reasonably infer intent from the actions of mentally competent defendants who understand and control their conduct. However, the inference becomes unwarranted when viewed in terms of mentally ill defendants who do not understand their actions or the potential consequences of their conduct. An inference must be based on proven facts and warranted deductions from those facts.¹⁴⁷ A fact finder cannot warrant an inference of criminal intent deduced from the actions of a delusional schizophrenic, or someone with a similar mental defect.

A court considers a defendant's mental disease or defect for the third time during the sentencing stage of a criminal proceeding. At that stage, the court determines whether the defendant should be committed to a mental institution or to the state prison.¹⁴⁸ The trial judge's consideration of mental defect during

Amicus Curiae Brief for the American Bar Association at 7, *United States v. Lyons*, 731 F.2d 243 (5th Cir.) (en banc), cert. denied, 469 U.S. 930 (1984).

143. 442 U.S. 510 (1979); see *supra* notes 107-10 and accompanying text.

144. See Petitioner's Brief, *supra* note 82, at 26-29.

145. *Cowan*, 260 Mont. at 516, 861 P.2d at 888.

146. Section 26-1-502 of the Montana Code provides:
An inference must be founded:

(1) on a fact legally proved; and

(2) on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

MONT. CODE ANN. § 26-1-502 (1993).

147. MONT. CODE ANN. § 26-1-502 (1993).

148. See MONT. CODE ANN. § 46-14-311 (1993).

the sentencing phase of the trial affords the judge unfettered discretion to decide the rehabilitative needs of the defendant.¹⁴⁹ Mentally ill defendants, convicted of a crime they may not have understood or controlled, must endure the social stigma of criminal convictions even if the court elects to commit them to the care of the Department of Institutions. Based on the judge's discretion, the defendant may be sent to prison and not receive needed treatment.¹⁵⁰

A criminal system absent the insanity defense contravenes the notion that a criminal conviction represents society's judgment that a person has chosen to violate social, moral, and legal principles.¹⁵¹ People unable to understand their own actions or conform their conduct to the law suffer from mental illnesses. They need treatment from trained professionals, not the disgrace, shame, and punishment of criminal convictions. Convicting those defendants for crimes that lacked criminal intent advances no goal of deterrence.¹⁵² Instead, the conviction may result in the imprisonment of a severely mentally ill defendant. Allowing a judge the broad discretion to determine if the defendant's condition warrants hospitalization may not provide adequate protection for the defendant.¹⁵³ Consequently, Montana's abolition of the insanity defense disregards traditional notions of fairness.¹⁵⁴

VI. CONCLUSION

Because defendants have abused the insanity defense with false pleas of insanity, lawmakers have adopted reforms in criminal responsibility legislation. Unfortunately, the reforms have been fueled by a few well-publicized cases that represented a threat to

149. See generally David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279 (1993) (discussing and criticizing the role that judges play as social workers and the therapeutic and rehabilitative consequences of their decisions).

150. Consider the irony of sending a paranoid schizophrenic, who struggles to function under the best of conditions because of his delusional fear, to an overcrowded and dangerous prison full of convicted criminals.

151. Kathryn J. Fritz, *The Proposed Federal Insanity Defense: Should the Quality of Mercy Suffer for the Sake of Safety?*, 22 AM. CRIM. L. REV. 49, 65 (1984).

152. Montana's constitution states under a section entitled "Rights of the Convicted" that "laws for the punishment of crime shall be founded on the principles of prevention and reformation." MONT. CONST. art. II, § 28.

153. See Wexler, *supra* note 149.

154. See Wexler, *supra* note 13, at 532. The ABA opposes the abolition of the insanity defense, which it finds to be "an important moral underpinning of our criminal law." Rather, the ABA supports a cognitive test of criminal responsibility. Wexler, *supra* note 13, at 532.

public safety.¹⁵⁵ Cases, such as *Hinckley*,¹⁵⁶ have created a public misperception that the insanity defense is commonly used and abused, often resulting in the acquittal of dangerous offenders. Public concern stems from the fraudulent uses of the insanity defense and defendants who have used it to "beat the rap." However, lawmakers should recognize and protect defendants who suffer true mental illnesses. For those persons, the insanity defense imparts essential protection, and no adequate substitute exists. This balancing of society's need for protection and the right of the mentally ill has proven an almost impossible task, and criminal responsibility law remains tenuous. *Cowan* presents a perfect example of a case in which the insanity defense is crucial to a fair and moral legal system. Cowan suffered from paranoid schizophrenia. During and after his crime, he behaved in a manner unique to a person burdened with a severe mental illness. Cowan acted under the delusional belief that Doherty was a robot. Yet, under Montana's statutory definition, he acted "knowingly" because he knew that he was hitting the robot with a weapon. Cowan intended his physical acts, and the fact finder inferred the requisite mental state of knowingly. This inference is not reasonable when applied to a defendant like Cowan who suffers from delusions and a severe mental defect. Cowan did not understand his acts or their criminality, but the lack of criminal intent or mens rea is irrelevant to the Montana Supreme Court's analysis under Montana law.

Cowan illustrates the need for change in Montana law. In its present state, Montana's statutory scheme circumvents a defendant's right to due process by postponing the court's primary consideration of mental disease or defect until the dispositional stage of the trial. As a result, a defendant suffering from a severe mental illness may be criminally convicted. Although the insanity defense occasionally facilitates fraud and abuse, it also protects the fair treatment of mentally ill defendants. To adequately protect mentally ill defendants, the Montana Legislature should consider reinstating the pre-1979 mental disease and defect laws and restore insanity as an affirmative defense. The protection provided by the insanity defense is indispensable in a criminal system based on fairness and due process.

155. Wexler, *supra* note 13, at 528.

156. *United States v. Hinkley*, 525 F. Supp. 1342 (D.C. Cir. 1981).